No. 209.
Brf. of Walker for D. E.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1899.

No. 209.

HARRY GUNDLING,
Plaintiff in Error,
vs.
CITY OF CHICAGO,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

Brief and Argument for the Defendant in Error.

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Brief and Argument for the Defendant in Error.

BRIEF.

The case is not within the rule declared by this court in

Yick Wo v. *Hopkins*, 118 U. S., 356,

but is governed, as to the first point of plaintiff in error, by

Crowley v. *Christensen*, 137 U. S., 86.

See, also,

Barbier v. *Connolly*, 113 U. S., 27.
Soon Hing v. *Crowley*, 113 U. S., 703.
Dent v. *West Virginia*, 129 U. S., 114.
Powell v. *Pennsylvania*, 127 U. S., 678.

And, as to the second point of plaintiff in error, by

St. Louis v *Western Union Telegraph Co.*, 148 U. S., 92, 104.

Postal Telegraph Cable Co. v. *Baltimore*, 156 U. S., 210.

Whether the ordinance in the record really does vest arbitrary and unlimited power in the Mayor of the City of Chicago, is a question which involves only the correct interpretation of the words used in said ordinance, and that question has been decided adversely to the contention of plaintiff in error by the Supreme Court of the State of Illinois in

Gundling v. *City of Chicago*, 176 Ill., 340.

The subject matter of the ordinance being purely domestic, this court should adopt the interpretation of the Supreme Court of the State of Illinois.

McElvaine v. *Brush*, 142 U. S., 155, 160.

Morley v. *Lake Shore Railway Co.*, 146 U. S., 162, 166.

In view of the interpretation put upon the ordinance by the Supreme Court of the State of Illinois, and because of that respect which is due from this court to the officials and courts of a State, this court must presume, at least, nothing to the contrary appearing in the record, that, in proceedings under the ordinance, no unfair or unjust action will be tolerated.

Dent v. *West Virginia*, 129 U. S., 114, 124-5.

Player v. *Vere*, T. Raymond, 288, 293, 324, 326.

In re Flaherty, 105 Cal., 558.

And that presumption becomes a certainty, when the established law of the State of Illinois upon kindred subjects is known.

Illinois State Board of Dental Examiners v. *The People*, 123 Ill., 227.
Zanone v. *Mound City*, 103 Ill., 552.
The People v. *The Board of Commissioners of Cook Co.*, 176 Ill., 576, 581.
State Board of Dental Examiners v. *The People*, 20 Ill. App., 457.

As the Supreme Court of the State of Illinois decided the case upon its interpretation of the ordinance, and as its decision may be sustained upon such interpretation of the ordinance alone, and as that interpretation involves no question of a Federal nature, the case may be dismissed.

Miller's Executors v. *Swan*, 150 U. S., 132.

The sale of tobacco in the form of cigarettes is a subject-matter within the police power of a State.

Gundling v. *City of Chicago*, 176 Ill., 340.

It is not an unlawful restraint upon the fundamental right of a man to pursue a lawful calling, to require a person, desirous of pursuing the calling of selling cigarettes in the City of Chicago, to be possessed of such a character or reputation as has some natural relation to such calling.

Yick Wo v. *Hopkins*, 118 U. S., 356, 368.
Crowley v. *Christensen*, 137 U. S., 86.
Barbier v. *Connolly*, 113 U. S., 27.
Soon Hing v. *Crowley*, 113 U. S., 703.

Dent v. *West Virginia*, 129 U. S., 114.
City of Brooklyn v. *Breeslin*, 57 N. Y., 591.
People v. *Mulholland*, 82 N. Y., 324.
City of St. Louis v. *Knox*, 6 Mo. App., 247; s. c., Affd., 74 Mo., 79.
Grand Rapids v. *Braudy*, 105 Mich., 670.
Commonwealth v. *Hubley*, 172 Mass., 58.
In re John Flaherty, 105 Cal., 558.
State v. *Schoenig*, 72 Minn., 528.
In re Bickerstaff, 70 Cal., 35.
People v. *Warden*, 144 N. Y., 529.
State v. *Gardner*, 58 Ohio St., 599.
Singer v. *State*, 72 Md., 464.
State ex rel v. *Benzenberg*, 101 Wis., 172.
Player v. *Vere*, T. Raymond, 288, 324.
Shaw v. *Pope*, 2 B. & Ad., 465.

Whether a person, desirous of pursuing the calling of selling cigarettes in the City of Chicago, is, in point of fact, a fit person to be allowed to engage in such calling, may be left to the judgment of another person, or body of persons, other than a judge and jury, without invading any fundamental right of such person.

Cases last cited.

So far as appears in this record, the sum of $100 is not an unreasonable fee to exact for a license to sell cigarettes in the City of Chicago.

St. Louis v. *Western Union Telegraph Co.*, 148 U. S., 92, 104.
Van Hook v. *City of Selma*, 70 Ala., 361.
Tiedeman, Limitations of Police Power, p. 274.
Cooley, Const. Lim., Ed. 5, note on pp. 245, 614.

City of Burlington v. *Putnam Ins. Co.*,
31 Ia., 102.

And cases cited in the argument following of instances where license fees quite as high as the fees fixed by the ordinance at bar were held to be not unreasonable.

ARGUMENT.

The argument advanced on behalf of the plaintiff in error attempts to bring his case within the ruling of this court in the well-known case of *Yick Wo* v. *Hopkins*, 118 U. S., 356. But, it is respectfully submitted, the attempt cannot succeed. The case at bar is governed by the subsequent decision of this court in *Crowley* v. *Christensen*, 137 U. S., 86, where the true meaning and limitation of the ruling in *Yick Wo* v. *Hopkins* is explained and enforced. The business regulated by the ordinance of the City and County of San Francisco in *Crowley's* case was the business of selling intoxicating liquors, while the business regulated in the ordinance of the City of Chicago in the case at bar is the business of selling cigarettes. Neither business can be said to be, like the business regulated in *Yick Wo's* case, viz., the laundry business, "a business harmless "in itself and useful to the community." As pointed out in *Crowley's* case, the business of selling intoxicating liquors may be entirely prohibited by a State without violating any inhibition of the Federal constitution. While it has not been actually decided that a State may entirely prohibit the sale of cigarettes, it would appear that there can be little doubt that a State may lawfully regulate that business, and may prohibit the sale of cigarettes to very young persons, say under five years of age, or under sixteen years of age, as the State of Illinois has done. (Hurd's Rev. Stat., Ill., 1897, Ch. 38, Par. 42f.)

In *Powell* v. *Pennsylvania*, 127 U. S., 678, this court

decided that a State may lawfully prohibit the manufacture and sale of oleomargarine.

In view of the decisions of this court in *Crowley's* case, *supra*; in *Barbier* v. *Connolly*, 113 U. S., 27; *Soon Hing* v. *Crowley*, 113 U. S., 703, and *Dent* v. *West Virginia*, 129 U. S., 114, if it can be held that anything in *Yick Wo* v. *Hopkins*, *supra*, justifies an assertion that the case at bar really involves any Federal question, then any petty police regulation that a city, or village, may pass may be brought up into this court from a State court, and this court thus may be compelled to take upon itself the office of "chief of police," if the expression may be used, over all the States, and to finally decide upon matters which, from time immemorial, have been left, and safely left, to the control and discretion of local officials and assemblies.

As to the point urged on behalf of plaintiff in error, that the amount of the license fee, viz., one hundred dollars per annum, is unreasonable: So far as appears, that point was not urged at all in the Supreme Court of the State of Illinois, to which this writ of error is directed. Under the settled, and well understood, rule for deciding such a point, on this record, there is no merit in the contention of plaintiff in error, and that would appear to be settled decisively in the quite recent decisions of this court in *St. Louis* v. *Western Union Telegraph Company*, 148 U. S., 92, 104, and *Postal Telegraph Cable Company* v. *Baltimore*, 156 U. S., 210.

I.

The first point of plaintiff in error is thus stated by him on page 10 of his argument: "The ordi-

"nance vests arbitrary and discretionary authority in "the Mayor, and is, therefore, void." Said proposition involves a premise and a conclusion. The premise, viz.: "The ordinance vests arbitrary and discretionary authority in the Mayor," obviously presents no Federal question, and the question it presents relates to, and draws in argument, only the proper *construction and interpretation* of the language used in the ordinance. This ordinance has been before the Supreme Court of the State of Illinois, and that court did not give, nor show any disposition to give, the ordinance a construction which would "leave room for the play and action of purely personal and arbitrary power" by the Mayor of the City of Chicago.

Why should this court seek to give a different construction to the ordinance? The subject-matter of the ordinance relates exclusively to a small matter of internal police. All proceedings under the ordinance must be carried on by local officers and before local courts.

The speculations of plaintiff in error (reasoning from the probable to the actual, and arguing the question of the validity of the ordinance solely upon the basis of the supposed and imaginary opportunities its terms afford for unequal and unjust discrimination in its administration and actual operation—*Yick Wo* v. *Hopkins*, 118 U. S., 356, 373) must be regarded as wholly extravagant, unfounded and unreasonable, and based upon an unwarranted assumption, that the officials and courts of the State of Illinois are either ignorant of, or will deliberately disregard, the principles upon which our government rests.

In *Dent* v. *West Virginia*, 129 U. S., 114, 124-5, involving the validity of a State statute requiring every practitioner of medicine to obtain a certificate from the

State Board of Health, this court said: "If in the pro-"ceedings under the statute, there should be any unfair "or unjust action on the part of the Board in refusing "him a certificate, we doubt not that a remedy would be "found in the courts of the State. But no such imputa-"tion can be made, for the plaintiff in error did not sub-"mit himself to the examination of the Board after it "had decided that the diploma he presented was insuf-"ficient." In other words, "respect ought to be had "to the city" of Chicago and its Mayor (for "'tis not "to be presumed when we consider what great trust he "is in already, that he should falsify it in so small a "matter" *Player* v. *Vere*, T. Raymond, 288, 293, 324, 326, involving licensing of carts in the City of London), and to the courts of the State of Illinois. "Laws are "not made upon the theory of the total depravity of "those who are elected to administer them; and the pre-"sumption is that municipal officers will not use these "small powers villainously and for purposes of oppres-"sion and mischief." (*In re Flaherty*, 105 Cal., 558, 562.) The Supreme Court of the State of Illinois has more than once ruled emphatically that the arbitrary withholding of a license from a proper applicant can be, and will be, judicially controlled and prohibited. (*The Illinois State Board of Dental Examiners* v. *The People ex rel. Cooper*, 123 Ill., 227; *Zanone* v. *Mound City*, 103 Ill., 552; *The People ex rel. Hetty H. R. Green* v. *The Board of Commissioners of Cook County*, 176 Ill., 576, 581; *Illinois State Board of Dental Examiners* v. *The People*, 20 Ill. App., 457.)

II.

A singular confusion of thought appears in the argument of plaintiff in error. He argues that the Council of the City of Chicago cannot delegate its power to license; that, in this instance, it has delegated that power to the Mayor of the city and hence the ordinance is void. And he concludes that, because power is illegally given to the Mayor, it must be arbitrary power and must be exercised arbitrarily by him. Apparently, he concedes that arbitrary power, when vested in the City Council, is, if not good in itself, at least not so objectionable as arbitrary power vested in the Mayor.

The argument for plaintiff in error seems to concede that if the words "Mayor of the City of Chicago," where they appear in the ordinance at bar, were stricken out, and the words "City Council of the City of Chicago," were substituted therefor, the ordinance would in no way conflict with any provision of the Federal constitution. If that is a correct statement of his argument, the question arises, what Federal question is before this court?

The right of the City Council of Chicago to delegate its power to license the selling of cigarettes to the Mayor of the city presents no Federal question. A delegation by a city council of power vested in it by the legislature of the State is void, not, as a rule, on any principle of constitutional law, but on that maxim of the law of agency which says, *Delegata potestas non potest delegari*. The State is the principal, and the city council is the agent, and, like every other agent, takes its power upon a personal trust and confidence, and such power must be personally exercised. (*Clark* v.

Corporation of Washington, 12 Wheaton, 40, 53-54; Dillon, Municipal Corporations, Ed. 4, § 96.) But the State may sometimes authorize its agent, the city council, to delegate powers to sub-agents, and such authority may be given expressly (*City of Brooklyn* v. *Breslin*, 57 N. Y., 591), or by implication (*Galveston* v. *Hitchcock*, 96 U. S., 341, 348).

Whether the State of Illinois has either expressly, or by implication, authorized the City Council of the City of Chicago to delegate to the Mayor of the city its power to license the sale of cigarettes, and whether the City Council has in fact made such delegation in the case at bar, are questions not before this court on this record. They are questions of purely local law, depending upon the meaning of the city charter and the ordinance at bar.

III.

Appellant concedes, and must concede, that tobacco in the form of cigarettes, is a proper subject-matter for the exercise by a State of its police power.

Does the State do any wrong, does the State deny to its citizens any fundamental right, when it says, that no person shall sell cigarettes in the City of Chicago, unless he complies with the conditions prescribed by the ordinance at bar?

One of the conditions is the possession by the applicant of "good character and reputation." "Good character and reputation" must necessarily be construed with reference to the business. A man might have a very bad character and reputation as a plumber, for example, and yet be a good enough man to sell cigarettes. "Good

character and reputation means " such a character and reputation as bear some natural relation to the calling.

It cannot be denied, and it never has been denied, that a State has the power to prescribe, that an individual who desires to follow a trade or calling, the reckless pursuit of which has a tendency to injure the lives and property of others, shall be possessed of qualifications which bear some natural relation to the trade or calling, and the possession of which affords some reasonable guaranty that the trade or calling will be practiced intelligently, and with some regard to the laws of the State and to the welfare of others. It certainly is not unreasonable to require a man who wants to sell cigarettes to have some sort of a character and reputation.

That being so, necessarily, some one must, in the first instance, decide on the character and reputation, and it would seem to be immaterial whether the power to decide the question be vested in one man, or in a body of men. A grant of power to decide such a question in the issuing of licenses has never been regarded as the giving of arbitrary power to the grantee, and, in Illinois at least, the courts have always prohibited the arbitrary exercise of such power when vested either in individuals, in boards, or in city councils.

In the ordinance at bar, an applicant for a license is required to furnish a bond in the sum of $500, "with at least two sureties to be approved by the Mayor." There is quite as much opportunity for the exercise of arbitrary power in passing upon the sufficiency of proposed sureties on a bond as there is in passing upon the character of an applicant for a license, yet no complaint is made of this part of the ordinance.

Plaintiff in error cites no precedent where an ordinance, or a statute, vesting no more authority and discretion in an official, or in a board, or in an assembly, than does the ordinance in the case at bar, has been construed as a vesting of arbitrary and unlimited power. Indeed, it is very common and usual, and always has been, in regulating the granting of licenses, to prescribe, that the applicant shall be a fit person, and to submit the fact of fitness to the judgment of an official, or of a board.

In *Yick Wo* v. *Hopkins*, 118 U. S., 356, this court said (p. 368): "The ordinance, therefore, also differs from "the not unusual case where discretion is lodged by law "in public officers or bodies to grant or withhold licenses "to keep taverns or places for the sale of spirituous liq- "uors and the like, where one of the conditions is that "the applicant shall be a fit person for the exercise of "the privilege, because in such cases the fact of fit- "ness is submitted to the judgment of the officers and "calls for the exercise of a discretion of a judicial nat- "ure."

In *City of Brooklyn* v. *Breslin*, 57 N. Y., 591, an ordinance of the common council of the City of Brooklyn provided that the mayor might grant licenses to such persons as he may deem proper, of the age of twenty-one years and of good moral character, and not otherwise, to carry on the business or trade, or to act in the capacity, of coachmen, porters, owners and drivers of hacks, junk wagons or carts and of common carriers, and the ordinance was held to be valid.

In *People* v *Mulholland*, 82 N. Y., 324, an ordinance provided that the mayor might grant licenses to sell milk in the city to such persons as in his judgment shall appear proper, and it was held valid.

In *City of St. Louis* v. *Knox*, 6 Mo. App., 247 (affirmed in 74 Mo., 79), an ordinance of the City of St. Louis provided that no license should be granted to a horse or cattle dealer without a certificate from the board of police commissioners that the applicant is of good moral character, and it was held valid.

In *Grand Rapids* v. *Braudy*, 105 Mich., 670, an ordinance provided that persons desiring to go into the business of pawnbroking, junk dealing, or dealing in second-hand goods, must present an application in writing, signed by at least twelve freeholders of good reputation, certifying to the good reputation, fair fame, and moral character of the applicant or applicants. The ordinance was held valid.

And in each and all of the following cases the validity of city ordinances leaving to officials more or less discretion as to the fitness of persons for certain callings was involved, and in each and all of them the ordinances were sustained:

Commonwealth v. *Hubley*, 172 Mass., 58.
In re John Flaherty, 105 Cal., 558.
State v. *Schoenig*, 72 Minn., 528.
In re Bickerstaff, 70 Cal., 35.

See, also,

Player v. *Vere*, Sir T. Raymond Reports, 288, 324.
Shaw v. *Pope*, 2 B. & Ad., 465.

This court is familiar with the decisions holding that a State has the power to prescribe that a man must possess certain qualifications in order to go into the business of plumbing, and to leave the fact of the possession of such qualifications to the judgment of boards of examiners.

See

People v. *Warden*, 144 N. Y., 529.
State v. *Gardner*, 58 Oh. St., 599.
Singer v. *State*, 72 Md., 464.
State ex rel. v. *Benzenberg*, 101 Wis , 172.

In all of said cases it appears that more or less power was vested in boards of examiners.

As tending to show that the power of these boards cannot be arbitrarily exercised, see

People ex rel. Kelly v. *Scott*, 86 Hun, 174.

In *Dent* v. *West Virginia*, 129 U. S., 114, this court had before it the question of the power of a State to require a man desiring to practice medicine to possess certain qualifications, and to leave the decision of the fact of an applicant's having the prescribed qualfications to the State Board of Health.

I V.

Some complaint is made of the power to revoke licenses vested in the Mayor by the ordinance in the record. The ordinance expressly requires the Mayor to give the licensee notice before revoking his license, and evidently contemplates that the Mayor shall give the licensee a hearing. This feature of the ordinance invades no fundamental right of plaintiff in error, and, moreover, as he has never taken out a license, and, consequently, no one can be seeking to revoke his license, what complaint can he have?

V.

As to the contention of the plaintiff in error that the ordinance in the case at bar is void because the fee exacted is unreasonable, very little need be said. The rule of decision is correctly stated in

Van Hook v. *City of Selma*, 70 Ala., 361, 365.

"When the question of the reasonableness of a municipal by-law or city ordinance is raised, and it has reference to a subject-matter within the corporate jurisdiction, it will be presumed to be reasonable unless the contrary appears on the face of the law itself or is established by proper evidence."

See

Tiedeman, Limitations of Police Power, p. 274.

Cooley, Constitutional Limitations, Ed. 5, 245, note, and p. 614, note.

City of Burlington v *Putnam Ins. Co.*, 31 Iowa, 102.

A striking illustration of the application of this rule is found in the decision of this court above referred to, viz: *St. Louis* v. *Western Union Telegraph Company*, 148 U. S., 92, 104.

How can this court judicially know that the amount of the license fee fixed in the ordinance at bar is unreasonable? The contrary is presumptively true.

The following are a few instances where license fees have been held to be not unreasonable:

$1,000 annually for a theatre, in

Boston v. *Schaffer*, 9 Pick., 415.

$15 annually for each car of a street railway company, in

State v. *Hilbert*, 72 Wis., 184.

An annual license fee of $200 for butchers, in

City of St. Paul v. *Colter*, 12 Minn., 41.

$150 per annum for retail liquors, in

Mayor v. *Beasley*, 1 Humphrey, 232.

$500 per annum for retail liquor dealers, in

Perdue v. *Ellis*, 18 Ga., 586.

$5 to $10 per annum on every vehicle used by milk dealers, in

People v. *Mulholland*, 82 N. Y., 324.

$200 annually for pawnbrokers, in

Van Baalen v. *The People*, 40 Mich., 258.

The Supreme Court of Illinois has said that it has always applied a liberal rule of construction in reference to license fees.

Kinsley v. *Chicago*, 124 Ill., 559, 363,

where the Illinois cases are cited.

The charter of the City of Chicago (Hurd's Revised Statutes, Ill. (1897), Chap. 24, Art. 5, Sec. 62, clause 4), gives to the City Council the power to fix the amount, terms and manner of issuing and revoking licenses. Under such a grant of power the amount of the fee which the City Council fixes, is rarely held to be unreasonable.

Childrey v. *The People*, 11 Mich., 43, 49, 50.

It is respectfully submitted, that the record in the case at bar shows no illegal invasion by the State of Illinois of any fundamental right of the plaintiff in error.

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